JD–17–18
Cheshire, Conn

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SENIOR PHILANTHROPY OF
CHESHIRE, LLC D/B/A CHESHIRE
REGIONAL REHAB CENTER

and Case No. 01-CA-184184

MARVIN MOORE, AN INDIVIDUAL

Charlotte S. Davis, Esq., and
Alan L. Merriman, Esq.,
for the General Counsel.
Jason Stanevich, Esq.,
(Littler Mendelson, P.C.)
New Haven, Connecticut,
for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, U.S. Administrative Law Judge. I heard this case in Hartford, Connecticut, on November 29 and 30, and December 1, 2017. Marvin Moore, an individual, filed the initial charge on September 14, 2016, asserting that he was terminated in June 2016 because he participated in National Labor Relations Board (Board) proceedings. Moore submitted three amended charges to add assertions that he was discriminated in other respects because of his prior participation in Board proceedings: on November 7, 2016, he added an allegation regarding the final warning he received on May 12, 2016; on December 16, 2016, he added an allegation that the Respondent had regularly altered his work schedule since April 2016; and on May 31, 2017, he added an allegation regarding the performance improvement plan that the Respondent issued to him at the same time as the May 12 final warning. The General Counsel issued the Complaint on July 28, 2017. The Complaint alleges that the Respondent, Senior Philanthropy of Cheshire, LLC d/b/a Cheshire Regional Rehab Center (the Respondent or Cheshire) violated Section 8(a)(4) and (1) of the National Labor Relations Act (the Act) by subjecting Moore to more onerous working conditions and then disciplining and eventually discharging him because he previously filed a charge with the Board and gave testimony. The theory of discrimination here is unusual in that Moore's prior charge and testimony did not allege that any wrongdoing was committed while the Respondent was operating the facility, but rather that wrongdoing occurred during an earlier period when an entirely separate company was operating the facility. The Respondent filed a timely answer in which it denied committing any violation of the Act. On the entire record, including my

observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT[1]

I. JURISDICTION

The Respondent, a corporation, provides skilled nursing and rehabilitation care at its place of business in Cheshire, Connecticut. In conducting these operations the Respondent annually derives gross revenues in excess of $250,000 and receives goods valued in excess of $5000 directly from points outside the State of Connecticut. The Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

Since January 1, 2015, the Respondent has been the operator of a nursing home in Cheshire, Connecticut, which is referred to as Cheshire Regional Rehab Center (the facility). The Respondent's employees include, among others, licensed practical nurses (LPNs) and certified nursing assistants (CNAs). The Respondent's employees are not represented by a Union. The Charging Party in this case, Marvin Moore, worked as a CNA for the Respondent at the facility from November 5, 2015, until the Respondent terminated his employment on June 13, 2016. As a CNA, Moore was responsible for assisting residents with activities of daily living such as dressing, grooming, transferring from one position or location to another, eating, and toileting. The facility has a ground floor with common areas and administrative offices, and residents are housed on the upper three floors. Each resident floor has four hallways – identified by the letters A, B, C, and D.

Prior to when the Respondent began operating the facility, a nursing home was operated in the same building by a company known as Highlands Health Care Center. During this earlier period, the operation in the building was referred to as "the Highlands." The Highlands and the Respondent do not have common ownership, a subsidiary-parent relationship, or an affiliate relationship. On January 1, 2015, the Respondent took over operating the nursing facility from the Highlands without a break in the provision of services to residents and with the Respondent hiring most of the Highland's nursing staff. Prior to his work with the Respondent, Moore had a period of employment with the Highlands. Specifically, he worked with the Highlands from March 3, 2011, until about September 10, 2014, when the Highlands terminated his employment. On September 15, 2014, Moore filed an unfair labor practices charge alleging that the Highlands unlawfully terminated him because he expressed pro-union sentiments. The Respondent did not have any hand in operating the facility at the time the Highlands terminated Moore and, in fact, the Respondent did not even exist as a corporate entity until three months later in December 2014.

On January 1, 2015, the Respondent became the licensee and tenant of the facility previously operated by the Highlands. After that development Moore, on February 12, 2015,

[1] After the close of the hearing, but consistent with on-the-record discussions during the hearing, the Respondent submitted a proposed exhibit consisting of the transcript of a May 5, 2016, conversation between Marvin Moore and Shawna Walker. The parties have stipulated to the admission of the exhibit. The proposed exhibit is hereby received into evidence as Respondent Exhibit Number (R. Exh.) 31.

amended his charge to add the Respondent as an employer. At the time of this amendment, Moore had never worked for the Respondent. No allegation was added claiming a violation based on actions occurring after the Respondent took over the facility. Rather, it appears that Moore added the Respondent as an employer in order to make employment at the facility possible as part of a resolution of the charge. The charge was eventually resolved through a non-Board settlement under which the Highlands agreed to compensate Moore for lost earnings. In addition, in light of the fact that the Highlands could no longer offer Moore employment at the facility, the Respondent agreed to offer employment to Moore as part of the settlement.[2] The portion of the settlement relating to the relief that the Respondent was providing to Moore stated:

> [The Respondent] will, within ten (10) days of the effective date of this agreement, contact Marvin Moore and offer him employment by [the Respondent] in the position he formerly held with [the Highlands] with his prior seniority intact, assuming he satisfies the uniform hiring prerequisites to which all employees of [the Highlands] were subject prior to employment with [the Respondent].

The settlement included a statement that it did not reflect any admission of wrongdoing or liability by the Respondent. The Respondent executed the settlement on October 26, 2015. The Administrative Law Judge's Order approving withdrawal of the charge and dismissal of the complaint in the prior case was entered on November 2, 2015.[3]

The upper-level management at the Respondent includes an executive director/administrator (executive director), a director of nursing services (DONS) who reports to the executive director, and an assistant director of nursing services (ADONS) who reports to the DONS. As will become clear below, during the relevant time period there was a great deal of turnover among the managers who filled these positions. This turnover occurred not only coincident with the Respondent taking over operation of the facility, but during the subsequent period. In addition to the managers, the Respondent assigns charge nurses to the hallways on each resident-care floor and they provide direct supervision to the CNAs.

Since taking over the facility, the Respondent has contracted with Tradition Senior Management, Inc. (Tradition Management), consultants who help manage the facility. Tradition Management provides management assistance to many skilled nursing and assisted living facilities, including to over 30 buildings other than the one the Respondent operates. Tradition Management does not share common ownership or have a subsidiary-parent relationship with either the Respondent or the Highlands. During the period when the Highlands operated the facility, Tradition Management had no role there, although it did assist the Respondent with aspects of the transition.

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[2] Aaron Bloom, the General Counsel of Tradition Management, represented the Respondent regarding the settlement. He testified that officials of the Highlands told him that they wished to settle with Moore, but needed the cooperation of the Respondent, as the new operator, to help with the re-employment remedy. Bloom credibly testified that the Respondent agreed as "part of our ongoing cooperation with the prior operator."

[3] The General Counsel repeatedly states in its brief that the Highlands discriminated against Moore on the basis of his union support. The record here does not establish such discrimination, which in any case is not directly relevant to the question of whether the Respondent, a completely separate entity, violated Section 8(a)(4) by discriminating against him on the basis of his prior Board charge and testimony, not on the basis of union support.

The record contains no evidence of pro-union activities at the facility during the period since the Respondent took over the operation.

B. Moore Begins Work at the Respondent Pursuant to Settlement

When Moore came to the Respondent pursuant to the settlement, he was required, as were all the former Highlands CNAs who the Respondent hired, to complete an application process with the new operator. The settlement agreement stated that Moore would have to satisfy the "uniform hiring prerequisites" that were available to "all employees" of the Highlands who came to work for the Respondent. Moore arrived at the facility at some time in October 2015 to fill out an application and met with Darcey Ahearn (ADONS) and Carol Herpst (infection control director). Although this was within 1 to 4 days of when the Respondent signed the settlement on October 26, 2015, and before issuance of the order approving withdrawal of the charge on November 2, 2015, Moore challenged Ahearn and Herpst about the fact that the Respondent had not contacted him sooner to arrange his employment. Ahearn and Herpst told him that an attempt had been made to contact him by phone, but Moore denied that he had been contacted. At any rate, the settlement stated that the Respondent had 10 days from the settlement's effective date to contact Moore and offer him employment.

The record shows that Ahearn had never worked for the Highlands and was in no way involved with that prior employer's decision to terminate Moore in September 2014.[4] In fact, the only management official who the record shows was present at the facility both at the time the Highlands terminated Moore and at the time the Respondent hired him was Lore Martinez, DONS – a manager to whom Moore had expressed pro-union sympathies while at the Highlands. However, Martinez left the Respondent a little more than a month after Moore came to work there, and had been gone 4 to 5 months by the time the Respondent took any of the actions that the complaint alleges are unlawful.

After Moore filled out an application, he underwent a security clearance process that included fingerprinting. Moore testified that he was "shocked" at being fingerprinted and expressed this to Ahearn. Although Moore testified that the fingerprinting requirement was an example of the Respondent discriminating against him, the credible evidence showed not only that fingerprinting was required by regulations of the State of Connecticut, but that Ahearn had explained this to Moore.

Moore subsequently received a letter, dated November 5, 2015, stating that he had been hired. After his hiring, Moore, along with four other individuals, began the Respondent's 40-hour orientation. The orientation was administered by Herpst and staff of the human resources department. Moore complained to Herpst about having to attend the orientation. Although the facility was now being run by an entirely new operator with its own employee handbook and work rules, Moore objected. He told Herpst, "I was reinstated to come back to work[, a]nd . . . I don't think I should be at orientation because I know the building and everything." Herpst stated that she would find out what was going on from the executive director, Robert Powers. After 2 days of the scheduled 40-hour orientation, Ahearn granted Moore's request to be excused from the orientation. According to Moore, he responded: "I've been saying this the whole time. I should never have been in orientation."

[4] Ahearn became the ADONS when the Respondent took over operation of the facility. On about May 3, 2016, she was promoted to DONS. She remained in the DONS position during the period when the Respondent disciplined and terminated Moore, but at the time she testified in this proceeding she was no longer employed by the Respondent.

When he started work at the Respondent, Moore also raised questions about his rate of pay. At the end of the period of Moore's employment at the Highlands he was receiving an hourly wage of $12. When he started with the Respondent, he was immediately paid a higher rate of $13.45 per hour. Moore raised a question about a wage increase that he thought was part of the settlement agreement. It is not clear whether by "wage increase" he was thinking of the regular increases that he would have received if he had not been terminated by the Highlands, or whether he believed he was entitled to something in addition to such increases. In an email on October 27, 2015 – a few days before Moore's hire date – Powers wrote to Bloom to ask, inter alia, how Moore's wage rate should be calculated. Bloom replied: "He should get whatever wage he would be currently entitled to, as if he had never left employment. There was no agreement, or even discussion, about any wage increase." By January 31, 2015, the Respondent increased Moore's rate to $15 per hour. On April 24, 2016, the Respondent increased his rate to $15.45 per hour – a raise that was granted without any request from Moore.

C. Moore Begins with Respondent as a Floater, and Eventually Obtains Permanent Assignment

At the time he had been terminated by the Highlands, Moore was in a CNA position, with a 32-hour per week schedule, on the day shift. He had a permanent assignment on the 4th floor, hallway D. When Moore returned to the building to work for the Respondent, he was placed in a CNA position, with a 32-hour per week schedule, on the day shift. Another employee had already been permanently assigned to the 4th floor, hallway D, and instead of bumping that employee, the Respondent initially assigned Moore as a "floater" who would work on various resident care floors/hallways. Moore objected that the settlement agreement language stating that the Respondent was to employ him "in the position he formerly held with [the Highlands] with his prior seniority intact," meant that the Respondent should reassign or remove the CNA who now had the 4th floor, hallway D, assignment so that Moore could immediately return to a permanent assignment on that floor/hallway. Moore expressed this view to both Powers (executive director) and Dall'Aste (payroll/benefits coordinator). Neither of these individuals had been employed at the Highlands and it appears that both were unfamiliar with the settlement language regarding Moore's employment. Moore characterized the situation this way: "Everybody was just lost. All department heads were just lost because the Company knew, but I guess they didn't really inform them."

Powers made email contact with Bloom – the Tradition Management attorney who had helped draft the settlement agreement – in an effort to ascertain whether the settlement required the Respondent to bump another CNA from the 4th floor assignment and place Moore in it immediately. Bloom responded that the settlement did not require such action. At trial, Bloom testified that the settlement required that Moore be employed as a CNA, on the same shift, with the same number of scheduled hours (32 weekly) and the same level of seniority for purposes of calculating pay and other benefits. Bloom credibly testified that the parties to the settlement had never agreed that Moore would be assigned to the 4th floor hallway D. Moore testified that when Powers informed him that the agreement did not mean that he would be able to bump into his desired floor/hallway assignment, "I . . . shook my head in disbelief and couldn't believe it."

As discussed above, Moore complained to Herpst about what he suggested was an unreasonable delay in reaching out to him about employment after the settlement. The record shows that this was at a time before the order withdrawing his charge pursuant to settlement had even issued and within a few days of when the settlement was executed. He also complained to Herpst about being required to participate, along with other recently hired individuals, in an orientation regarding the Respondent's operation. In December, about a

month after he was hired, Moore complained to Herpst again, this time about not receiving his preferred floor/hallway assignment. It is undisputed that, as of that point in time, Moore had not yet received a permanent assignment with the Respondent. According to Moore, Herpst responded to him, "Why do you always have to give us trouble? Why you can't just do what we tell you to do?" Herpst was not an individual who participated in the decisions to discipline and terminate Moore, and the record does not show that she had direct supervisory authority over Moore.[5] Moreover, the daily floor and hallway assignments, about which Moore was complaining to Herpst, were created by a different individual known as the scheduler or scheduling coordinator. The daily attendance reports – which communicate the assignments to CNAs – have boilerplate language stating that the scheduler and the DONS are the ones to be consulted about the assignments. Moore admitted that he did not know whether Herpst played any part in making the daily floor/hallway assignments.

After reviewing the evidence on this issue, I credit Bloom's testimony that the settlement agreement did not give Moore the right to be assigned to a particular floor or hallway at the facility on either a permanent or a temporary basis. Bloom was involved in drafting the agreement and his testimony is consistent with its language. The General Counsel did not present contrary testimony from a witness with similar direct knowledge about the drafting of the settlement. Moore's assertion that the settlement entitled him to bump into a particular floor/hallway assignment and/or otherwise choose his assignment relies on the language of the settlement. That settlement language, however, makes no mention of Moore being assigned to a particular floor or hallway and Moore does not claim that he was privy to settlement discussions during which the Respondent made oral statements committing to anything with regards to floor/hallway assignments. I note, moreover, that the record does not provide a basis upon which to conclude that either Moore's floater assignments or his eventual permanent assignment on the third floor was more onerous than the fourth floor assignment that he argues he was improperly denied. The record does not show, for example, that one assignment created the opportunity for more or less overtime, included work that was more or less physically demanding, or involved residents who were more or less difficult to care for. Nor was there evidence that the facilities or equipment on one floor/hallway were better or worse than those on another.

Moore, in addition to claiming that he was entitled to bump into a particular floor/hallway assignment because of the settlement's "position formerly held" language, also claims that he was entitled to that and other assignment prerogatives based on his seniority. However, Moore conceded that he was not aware of any written policy stating that seniority gave CNAs the right to priority placement in their desired floor/hallway assignments. The General Counsel submitted the Respondent's employee handbook as an exhibit, but points to no language in it, or in any other written policy, that recognizes a connection between seniority and preference in floor/hallway assignments. See General Counsel Exhibit Number (GC Exh.) 6. Nor was there any testimony identifying an employer representative who had announced such a preference. There was not even testimony from other CNAs that corroborated Moore's assertion. I find that the evidence does not establish that seniority entitled CNAs to bump other employees or otherwise choose their floor/hallway assignments or avoid schedule alterations and certainly not that it trumped resident-care considerations. To the extent that Moore testified otherwise, I find, based on his demeanor, his testimony, and the record as a whole, that his claims were self-serving,[6] uncorroborated, and unreliable. More credible was Bloom's contrary testimony that

[5] CNAs are directly overseen by charge nurses, who report to the ADONS, who reports to the DONS, who reports to the executive director.

[6] In general, I found Moore a less than credible witness. A few examples of the significant discrepancies between his account and the documentary evidence, and even between his own accounts

the settlement, which included restoration of Moore's seniority, did not entitle Moore to particular floor/hallway assignments. I note, moreover, that the record suggests that Moore's seniority was honored in the manner that Bloom testified that the parties had agreed to – i.e., Moore received pay, vacation time, and other benefits consistent with his prior service.

As noted above, Moore was assigned as a floater when he began work with the Respondent. Shortly thereafter, the Respondent's scheduler informed Moore that there was an available permanent assignment on the third floor. Moore submitted a written request, dated January 21, 2016, asking to be permanently assigned to the third floor. Leslie Merwin, who had recently come to the Respondent and replaced Martinez as the DONS, denied the request. Merwin's written denial states that permanent assignments were only available to employees working a 37.5 hour/week schedule, and Moore was working a 32 hour/week schedule. Moore approached Merwin to ask her to reconsider the denial. Merwin advised Moore to resubmit the assignment request. Within a day or two after Moore submitted that request, Merwin approved it. Merwin testified that she decided that the quality of Moore's work warranted making an exception to the rule against granting permanent floor/hallway assignments to employees working less than 37.5 hours per week.

Even when employees have permanent assignments, they will sometimes be assigned to a different floor or hallway for a particular shift on a temporary basis. Nevertheless the evidence shows that since the start of April 2016 – the period covered by the complaint allegation relating to assignments – Moore was assigned to the 3rd floor on every single one of the approximately 35 days that he worked. Respondent Exhibit Number (R. Exh.) 1. Although these records are less than clear with respect to hallway assignments it appears that from April 1 to the time of his termination, Moore was assigned to hallway B of the 3rd floor on approximately 31 of 35 shifts. On 2 days, Moore was given a "split" assignment for multiple hallways on the 3rd floor. The General Counsel argues that the record shows that the Respondent reassigned Moore more frequently than it did other CNAs with less seniority. The evidence showed that some CNAs had more assignment consistency than Moore while others – e.g., J. Miron – had less assignment consistency than Moore. Putting aside that the General Counsel has failed to establish that the settlement entitled Moore to avoid alterations of hallway assignments, I note that the record only establishes that a single CNA – Shawna Walker – had a later hire date than Moore, but greater consistency in assignments. During the period covered by the complaint, Walker was reassigned to a different hallway on just one shift, compared to Moore who was reassigned on approximately 4 shifts. The General Counsel does not cite to credible evidence showing that any other CNAs who had less seniority than Moore were reassigned less frequently than him.

D. Discipline Relating to Alleged Neglect by Moore

On May 4, 2016 – the date of Moore's alleged neglect of a resident – Moore was working his permanent assignment on the third floor of the facility. By this time, the executive director, DONS, and ADONS, who had been present when the facility was operated by the Highlands were long gone. Cynthia Roessler, who had been the executive director during the relevant portion of the Highlands era was gone, as was Powers, who had been the executive director when the Respondent hired Moore. Terri Golec, the executive director at the time of the discipline, had not worked for the Highlands and had yet to arrive at the Respondent either when Moore was hired pursuant to the settlement agreement or in October and November 2015 when Moore was raising objections about orientation, fingerprinting, his floor/hallway assignment, and supposed entitlement to a raise. Martinez, who had been the DONS at the time

at various times, are discussed below with regards to the events of May 4.

when Moore was terminated by the Highlands, and had been the DONS during Moore's first 5 weeks at the Respondent, was also long gone by the time a resident accused Moore of neglect. Also gone was Martinez's replacement, Merwin. Ahearn was the only manager who had been present when the Respondent hired Moore who was also present at the facility at the time the resident accused Moore of neglect. Even Ahearn had not worked for the Highlands – the employer who was operating the facility during the time of the wrongdoing allegations in Moore's prior charge. Ahearn had recently been promoted from ADONS to DONS to fill the vacancy left by Merwin's departure.

The record shows that on the day of Moore's alleged neglect of a resident, the floor on which he was working was short-staffed. For a brief time, there were just two CNAs – Moore and Shawna Walker – present to perform the work that was usually done by four CNAs.[7] Around the time of the alleged neglect, a third CNA had arrived on the floor to assist, but that CNA was still being trained. Damaris Castanon, an LPN, was also present on the floor as the charge nurse.

Moore was working at a computer situated in an eating area on the third floor. He was inputting information about resident care – a process that is described as "paperwork" even though it is performed directly on a computer. A "call light" went off for a room down the hall, indicating that a resident in that room had requested assistance. Moore left the computer and went to the room. There he found two residents who were requesting assistance with toileting. Resident #1 had recently had both of his legs amputated below-the-knee and was seated in a chair. This resident had experienced some health issues relating to episodes of incontinence and had been designated for special treatment – including routine, assisted, toileting before and after meals. His daughter had recently written to the Respondent to complain about the care provided to her father.

When Moore responded to the call light, he cleaned a handheld urinal and provided it to resident #1. Moore's understanding was that the resident was physically capable of using this urinal without being transferred to the bed. Nevertheless, the resident stated that he had to be transferred to his bed to use the urinal. Moore told the resident that, in that case, he would have to wait.[8] Moore also told resident #2 that he would have to wait for assistance with toileting. Moore did not return to assist either of these residents in this instance. Rather, Moore resumed working on a computer and never went back to the room to provide the assistance that the residents had requested. Instead, Moore told Walker and charge nurse Castanon that the residents had asked for assistance with toileting and that Walker should help them. Walker and another CNA eventually provided the assistance that the two residents had requested from Moore.

Later that day, one of the Respondent's social workers reported to Ahearn that resident #1 had complained to her about Moore's failure to assist him in toileting. Also that day, Malisha

[7] Shawna Walker is the same CNA who is sometimes identified in the record as Lashawna.

[8] Moore testified that this resident was an "assist-2" for transfers, meaning that two staff members had to participate in transferring the resident and Moore could not execute the transfer on his own. Written, in-room, "care card" instructions for the resident were introduced at trial. Those care instructions, and the testimony about them, indicate that this resident was an "assist-1" at the time of the May 4 incident, and that Moore, contrary to his testimony, could have transferred this resident without the assistance of a second staff member. Tr. 397-398, 443, 479; R Exh. 26. At any rate, even assuming that the resident required two-person assistance, it would not explain why, as is discussed infra, Moore resumed working on the computer instead of returning as soon as possible with another CNA so that the resident would not be left waiting to urinate.

Petteway, a CNA working on the 3rd floor during the next shift, reported to Ahearn, in writing, that resident #1 was complaining that he had an "awful morning" because he had asked Moore to help him with toileting and Moore "told him he was too busy he had a lot of paperwork to do and walked out of the room." The resident reported that he had to wait 20 minutes before two female aides came to assist him so that he could urinate. Ahearn then interviewed resident #1 on May 4 and made a written record of that interview, which Ahearn signed. According to that account, when the resident said he "needed to be put in bed in order to use the urinal," Moore responded "I don't have time for that, I have important paper work to do." Then Moore told the resident that he would "get someone else to help," but the resident waited 20 minutes before he was assisted by two other CNAs.

On May 4, Ahearn initiated an investigation of Moore's possible failure to provide services and, on May 5, Ahearn met with Moore and suspended him pending the investigation.[9] Ahearn told Moore that resident #1 had complained that Moore said he had to finish paperwork before providing requested toileting assistance. As part of her investigation, Ahearn obtained statements, on May 5, from Castanon (the charge nurse on-duty) Walker (another CNA present on the 3rd floor), and Moore himself. Castanon's written account states that when Moore returned from responding to the call light, he resumed working on the computer and told Castanon that he was busy and that Walker should be the one to help resident #1 with toileting. Similarly, Walker's written account states that when Moore returned from responding to the resident call light, he went "back to finishing his computer work and asked me to help" the resident who needed assistance toileting. At the time, Moore did not confirm that Walker or anyone else actually provided the assistance requested by resident #1.

As part of the investigation, the Respondent gave Moore the opportunity to submit a written statement regarding the resident's complaint. Moore provided a written statement on May 5, which reads in its entirety:

> I was doing book work on the computer and resident light was going off. I answered the light and both residents said that they had to go to the bathroom. I asked the resident if he could wait until I finished. He said OK but I told I would go get somebody to take you to the bathroom. Just give me a few and I would definitely take care of you. I told [Walker] as I was passing down the hallway one minute after that on the way back down the hallway and informed her that the two guys was next and they had to be toileted and since she had the other aid[e] with her I assumed after telling her it would have got done.

On May 12, Ahearn issued a disciplinary suspension and final warning to Moore based on the May 4 incident. On the same date, Ahearn provided Moore with a performance improvement plan (PIP). The decision to take these actions was made by Ahearn in consultation with Golec. The disciplinary notice explained the basis for the discipline as follows:

> You answered a call light, the resident requested assistance getting back to bed to use the urinal. You told the resident you did not have time. You had important paperwork to finish. You then told the nurse to tell another CNA that the resident needed assistance while you finished your computer work. Resident care and safety must always come first; paperwork and/or computer work is not the first priority.

[9] Ahearn credibly testified that when abuse or neglect by a staff member is alleged, the Connecticut Department of Public Health requires that the facility remove that staff member from the facility until the investigation is completed.

The disciplinary notice stated that the "next step in level of action" for a repeat violation would be termination.

When the Respondent determines that an instance of neglect or abuse has occurred, it is required to report the matter to Connecticut Department of Public Health. The Respondent made the required report, and staff of the Department of Public Health made an unannounced visit to the Respondent's facility in November 2016 to investigate a number of matters, including the alleged failure to provide care to resident #1 on May 4. The Department of Public Health concluded that Moore's conduct constituted a violation of State regulations. On November 21, 2016, the State issued a citation to the Respondent for this violation. GC Exh. 25, Pages 10-11.

Moore's trial account regarding the May 4 incident differs in a few significant respects from the one discussed above. For example, at trial Moore claimed that when he left resident #1 he did not return to working on a computer, but rather proceeded directly to assist another resident who had finished using a bedpan. However, Moore's testimony in this regard is not only contrary to the contemporaneous written statements of both Castanon and Walker, but is not even supported by Moore's own written statement from the Respondent's investigation.[10] In addition, the transcript of a conversation that Moore recorded between himself and Walker reflects an understanding that upon leaving resident #1's room, Moore returned to performing paperwork. Not only that, but Moore's trial testimony that he was "giving a resident a bedpan" "right before" the call light went off, Transcript at Page(s) (Tr.) 82-83, is inconsistent with the written statement he provided during the investigation, in which he stated that he had been working on a computer at the time he responded to the call light.

Moore testified that he did not tell resident #1 that he would have to wait to be toileted while Moore finished paperwork. That is inconsistent with the contemporaneous account that multiple representatives of the Respondent received from resident #1. It is also undercut by Castanon's and Walker's contemporaneous written accounts, both of which indicate that when Moore left resident #1 he did, in fact, resume working on the computer. Moore's testimony is even undercut to some degree by his own contemporaneous written statement, in which he reports that prior to visiting the resident he had been "doing book work on the computer" and asked if the resident could "wait until I finished." I do not believe it is necessary to make a factual finding regarding these discrepancies because it is clear, at a minimum, that after an investigation the Respondent reasonably arrived at the version of events upon which it based Moore's May 12 discipline. It was not shown that before Moore was disciplined, he provided the Respondent with the more favorable account of his actions that he offered at trial. Nevertheless, to the extent that Moore's trial testimony portrays his actions on May 4 in a more favorable light than the version of events that emerged during the Respondent's investigation, I find, based on the evidence discussed above, that Moore's testimony was not truthful.

The testimony was unambiguous that CNAs are required to place resident needs over the completion of paperwork. Tr. 422, 525.[11] Moreover, although the record suggests that

[10] At any rate, Moore's conduct would not be proper even assuming he had made resident #1 wait for toileting assistance so that he could remove a bedpan from another resident. Merwin credibly testified that the proper action would have been for Moore to first help resident #1 to urinate since the resident who was on a bedpan was already "stable." Tr. 455-457.

[11] In addition, the record shows that during orientation with the Respondent, Moore was provided with a "Dependent Adult Abuse Staff Accountability Acknowledgment," which states that resident "[n]eglect includes, but is not limited to, lack of care and supervision and unmet physical, social, emotional, spiritual or medical needs." At the same orientation, Moore received a written statement of "resident's rights."

Moore may well have been correct in believing that resident #1 was capable of using the urinal without being transferred to the bed, it also shows that a CNA is required to honor a resident's choice from among the toileting options that have been approved for that resident. This, Merwin stated, is "a dignity issue" and "a human rights issue" for residents. Tr. 392-393.

The General Counsel presented evidence regarding multiple other instances when the Respondent determined that an employee's care of a resident fell short. GC Exh. 17. The bulk of such instances concern discipline from early to mid-2015 – a period immediately after the Respondent took over the facility in January 2015 and several months or more before Golec came to the facility as executive director. See, e.g., J. Melgarth (discipline from February 2015) and T. Williams (discipline from August 2015). Some were from the period before either Merwin or Ahearn were the DONS. In December 2016, one CNA, like Moore, was suspended and given a written warning, because she refused a resident's request for assistance with toileting. GC Exh. 17, Pages 99-100. The record shows that, at least initially, some of the employees discussed in the General Counsel's brief received a written warning or other lesser discipline, but not a suspension, where their conduct did not involve an intentional refusal of a resident's request for help. Ahearn credibly testified that there is a significant different between instances when a failure to provide care is inadvertent or careless and those when, as in Moore's case, the failure takes the form of a staff member's direct refusal of a resident's request for help. In the latter circumstance, Ahearn said, the Respondent is required to report the failure to the Connecticut Department of Public Health. Tr. 506-507, 509. I find that evidence regarding these instances of lesser discipline is not sufficiently detailed to give rise to an inference that the same decision makers treated Moore substantially differently than other employees, much less that they did so because of hostility towards the fact that Moore filed a charge, and gave testimony, alleging wrongdoing by his former employer. At any rate, as the General Counsel recognizes in its post-hearing brief, a number of the employees it discusses were ultimately terminated for their continued failings. See, e.g, N. Blizzard, C. Bradix, J. Miron.

The General Counsel presented testimony regarding a section in the Respondent's employee handbook that sets forth different types of discipline that the Respondent may impose. I note that neither that handbook section, nor any other policy statement, indicates that the Respondent had a progressive discipline policy in the sense of a schedule setting forth specific levels of discipline depending on the type of infraction or the number of infractions. The handbook section states that "[t]he Company is not bound to use progressive discipline in all cases and reserves the right to treat disciplinary situation[s] on a case-by-case basis." GC Exh. 6 at Pages 14-15. It further states that the violation of certain rules may result in "disciplinary action up to and including termination, even for a first offense." Id. at Page 13.

E. Discipline for Leaving the Facility without Clocking Out

The Respondent terminated Moore in June 2016 after he admitted he had left the facility's premises during his shift without clocking out. The Respondent maintains a time clock at the facility, and CNAs are required to clock in at the start of their shifts and clock out at the end of their shifts. The CNAs get two 15-minute breaks and one 30-minute break. The Respondent's employee handbook has a section, in effect at the time Moore was terminated, which states in relevant part: "Employees are also required to clock out any time they leave the work site for any reason other than assigned work duties." GC 6 at Page 26, Section 5.5. At orientation, Moore signed a document acknowledging receipt of this handbook. The reasons for the requirement that employees clock out if they leave the work site during their shift include: making sure employees are working when they are being paid; monitoring compliance with

Those rights include the right to "[r]eceive a prompt response to all responsible requests and inquiries."

staff-to-resident ratios; and allowing the Respondent to determine, for reasons related to liability, who is in the building in the event of an emergency. On May 24, 2016, a few weeks before Moore's termination, the Respondent posted a notice at the facility which stated: "If you are leaving the premises for your meal break you must punch out. Please punch back in when you are done with your break." The posting was placed in areas frequented by CNAs, but Moore testified that he had not noticed it.

On June 6, Adam Vargas, the Respondent's maintenance supervisor, informed Dall'Aste that he had seen Moore returning to the facility by car during his shift. Vargas[12] asked Dall'Aste whether Moore had clocked out before leaving the facility. Dall'Aste checked the time clock system, which indicated that Moore had not clocked out before leaving. Golec met with Moore that day and asked him whether he had left the premises during his shift. Moore admitted that he had left the facility and driven to a gas station to buy cigarettes. He conceded to Golec that before leaving the premises he had neither clocked out nor requested the charge nurse's approval to leave the facility. Golec informed Moore that the handbook required that employees clock out when leaving the facility during their shifts. Moore responded that he was not aware of this policy. He told Golec that he was "sorry" and stated: "[O]ut of the 5 years I've been here, . . . I never, ever left this building. This is my first time."

Moore's next scheduled work day was June 13. On that day, Ahearn suspended Moore pending investigation for leaving the premises without clocking out. At that time, Moore provided the following written statement to the Respondent:

> I left the building when I was on break around 9:05 a.m. Went to the gas station and returned by 9:10 a.m. I wasn't aware that we couldn't leave the building until the administrator informed me that . . . employee couldn't leave the building without punching out. It was my first time ever leaving the building out of the five years I have been here with the company.

Golec was the one who made the decision to terminate Moore for violating the rule against leaving the premises without punching out. She credibly testified that, at the time of that decision, she did not know that Moore had filed the prior Board charge. Tr. 568. As discussed above, Golec had not worked at the Highlands and had not yet arrived at the Respondent when Moore began his employment pursuant to the settlement of his charge alleging misconduct at the Highlands. Golec made the decision to terminate Moore after discussing the matter with Ahearn and Dall'Aste. Golec and Dall'Aste also sought email input from Heather McKamey, the vice president of human resources at Traditions Management. Prior to this time, McKamey's involvement at the Respondent had been, in her words, "arm's length" and she did not know Moore, had no part in the decision to hire him, and did not know who made the hiring decision. The consulting company for which McKamey worked had had no involvement with the Highlands when it operated the facility. On June 15, Dall'Aste provided McKamey with Moore's disciplinary file and asked "how you wish for us to proceed." Later that day, McKamey asked Dall'Aste for additional information – including Moore's signed acknowledgment of receipt of the employee handbook, a copy of the report the Respondent sent to the Connecticut Department of Public Health regarding Moore's alleged neglect of a resident on May 4, information about the

[12] Vargas was a custodial employee, not yet a supervisor, when Moore began working for the Respondent. Moore testified that, as a rank-in-file employee, Vargas had made some negative comments to him about his return to the facility and said he hoped Moore would not try to bring a union to the facility. According to Moore, he responded to Vargas by stating that he did not "have anything to do with a union." In its brief, the General Counsel does not argue that I should attribute Vargas' animus as a rank-in-file employee to the Respondent.

date the Respondent posted the notice about clocking out during meal breaks, and copies of the statements that the Respondent had received from Walker about the May 4 incident and from Vargas regarding the June 6 incident. McKamey reviewed the discipline question from what she characterized as a "compliance" perspective and found no basis for concern about Golec proceeding to take disciplinary action. Later on June 15, McKamey informed Golec that "If your intention is to term[inate] please let him [know] today or tomorrow." Golec responded: "Heather, thank you so much, at this time I feel we should term[inate], in my mind he stole from the company and indicated he tape recorded an employee, both are inappropriate."

Golec herself notified Moore of the termination decision by telephone. At trial, Golec testified that her decision to terminate Moore was based on his leaving the building during a shift without clocking out and without permission. She stated that she did not base the termination decision on the neglect incident in May. The Respondent has not claimed that Moore's attendance record played any part in the decision to terminate him. The record shows that, during Moore's 7-month tenure with the Respondent, he was late a total of 49 times. GC Exh. 24. Sometimes he was tardy by just a few minutes, but in numerous cases he was late by 10 minutes or more, and in some instances by over a half hour. Merwin discussed Moore's habitual tardiness with him, but the Respondent did not take any disciplinary action based on it.

At trial, Moore testified that other employees left the building without clocking out and were not disciplined. In particular, he reported that during their breaks a number of employees went outside without stopping at the time clock and jogged around the facility – sometimes crossing into areas that were beyond the facility's grounds, before circling back. Moore's testimony did not make clear how far off the facility's grounds these employees went, or whether they were still visible from the facility when doing so. Tr. 103-104. At any rate, based on Moore's demeanor, the testimony and the record as a whole, I find this testimony to be self-serving, vague, and unworthy of credence. Although Moore stated that joggers did not clock out before jogging into areas off the grounds, he did not name a single specific employee who had done this or identify a specific instance when it had occurred. On the face of it, Moore could not know that his assertions in this regard were accurate unless he had followed a particular employee inside the facility to see whether that employee stopped at the time clock and then followed that same employee outside and watched to see whether he or she strayed off the facility's grounds. Moore did not testify that he had made such efforts. Nor does he claim that he had any way of knowing whether the jogging employees had obtained their supervisor's approval to jog outside the building during their breaks. Even if Moore's testimony is credited, it would not establish that Golec, Ahearn, Dall'Aste, or McKamey had knowledge of these instances. Similarly, Moore stated that employees left the facility on their breaks to get food, but for much the same reason as her testimony regarding joggers, I found this testimony self-serving, vague, and unworthy of credence. Even if credited, his testimony would not show that Golec, Ahearn, Dall'Aste or McKamey knew about any such conduct.[13] In fact, Golec credibly

[13] The General Counsel presented the testimony of Elizabeth Martell regarding this point. Martell worked at the Respondent for a total of about 6 weeks in the spring of 2015. During that short period of time she was disciplined for tardiness – a fact she only recalled after being presented with information in her Board affidavit. She stated that during her period of employment she and other employees would sometimes leave the facility to get food without clocking out. Her testimony on this point was vague. She did not identify any of the other employees who supposedly did this, and was unable to say who the executive director, DONS or ADONS were at the time. At any rate, her brief period of employment would have been about a year prior to when Moore was terminated and prior to when Golec arrived at the facility. It was also long before the Respondent posted a notice to employees that indicated heightened concern about employees leaving the facility during their shifts. Even if one assumes that Martell's testimony was accurate, it would not demonstrate that the responsible officials were aware of Martell's violation or that the Respondent would not have taken some action against Martell based on the conduct

testified that she did *not* know of any other employees who had left the facility during their shifts without clocking out and gone to their cars or to "do laps" around the area. Tr. 545. The credible evidence did show that employees who smoked cigarettes during their breaks would do so in designated smoking areas outside the building. Golec was aware of this and of the location of the designated smoking areas. Thus employees who visited these smoking areas during their breaks could be easily accounted for if necessary. That is something that cannot be said of Moore when he drove away from the facility and went to a store without telling anyone he was leaving the premises and without clocking out.

The evidence showed that one employee, in addition to Moore, had been terminated for violating the policy against leaving the premises without clocking out. That employee, L. Lazare, was terminated on January 24, 2017 – about 7 months after Moore was terminated. Like Moore she left the facility to go to a store and did so without clocking out and without obtaining her supervisor's approval. Lazare, like Moore, was terminated for the first offense of this kind. She had a previous history of tardiness, and had received a first written notice for that conduct. She had never received a second written notice, a final notice, or a suspension, prior to being terminated. By the time of Lazare's termination, Golec and Ahearn were no longer with the Respondent. Dall'Aste was still present at the facility and signed Lazare's termination notice as a witness.[14]

F. The Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(4) and (1) by discriminating against Moore because he filed Board charges and gave testimony: since about April 2016 when it imposed more onerous working conditions on Moore by altering his work schedule; on about May 12, 2016, when it disciplined Moore; and on June 13, 2016, when it discharged Moore.

ANALYSIS

A. Discipline

The complaint alleges that the Respondent violated Section 8(a)(4) and (1) by discriminating against Moore because he filed an unfair labor practices charge and gave testimony alleging wrongdoing by the Highlands (his former employer), and later added the Respondent as an additional employer after it took over the facility. The General Counsel's brief also assumes that this complaint allegation is broad enough to encompass discrimination based

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if she had not ended her brief employment after being disciplined for tardiness. Moreover, although Martel did not recall ever being disciplined for failing to clock out when she left the facility during her shifts, she also initially stated that she did not recall the fact that she had been disciplined for tardiness. Given her short tenure, the issues with her memory, and the fact that she worked under different managers than Moore had, Martell was not a competent witness to testify about the enforcement of the clock-out rule during Moore's tenure.

[14] The General Counsel cites to lesser discipline that was issued to another CNA, L. Jenkins, for "missed punches" in late 2016 and early 2017. However, the evidence does not show the details of this violation. In particular, it does not show that Jenkins had, like Moore, left the premises in the middle of her shift without punching out and without notifying a supervisor.

on the Respondent's supposed animus against Moore for having been hired pursuant to the settlement of the prior charge.[15] The Board applies the analysis set forth in the *Wright Line* analysis to allegations that an employer violated Section 8(a)(4) and (1) by discriminating against "an employee because he has filed charges or given testimony" in a Board proceeding. *Verizon*, 350 NLRB 542, 546-547 (2007), *American Gardens Mgmt. Co.*, 338 NLRB 644, 644-645 (2001), *McKessen Drug Co.*, 337 NLRB 935, 936 (2002): *Gary Enterprises*, 300 NLRB 1111, 1113 (1990), enfd. 958 F.2d 368 (4th Cir. 1992) (Table). Under the Board's *Wright Line* analysis, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by considerations prohibited by the Act. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184-1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

For the reasons discussed below I find that the General Counsel has failed to meet its initial burden because it has not shown that the Respondent harbored animus towards Moore's prior Board activities. In reaching this finding, I considered that the Board closely scrutinizes the treatment of employees reinstated under Board orders and settlement agreements. See, e.g, *Sahara Las Vegas Corp.*, 297 NLRB 726, 732 (1990) and *Great Western Produce*, 293 NLRB 362, 370 (1989). I also considered that, in the absence of direct evidence of its existence, animus may be found based on the record as a whole, including "such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union [or other protected concerted] activity." *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. mem. 184 Fed. Appx. 476 (6th Cir. 2006); see also *Brink's, Inc.*, 360 NLRB 1206, 1206 fn.3 (2014); *Camaco Lorain Mfg. Plant*, supra.

Out the outset I note that the broad circumstances in which this case arises are not conducive to finding that the Respondent's actions were based on animus against Moore for previously filing charges with the Board and giving testimony. It was not until well after the alleged wrongdoing by the Highlands that the Respondent became the facility's operator. Why would the Respondent have any hostility against Moore based on prior charges and testimony that alleged wrongdoing by his *prior* employer and by the long-since departed managers of that employer? When Moore amended the prior charge to add the Respondent as an employer, he did not add any allegation that wrongdoing had taken place since the Respondent took over the

[15] In this regard, I note that while the complaint recites facts relating to the Respondent's hiring of Moore, the complaint allegation is that the Respondent violated Section 8(a)(4) by discriminating against Moore "for filing charges or giving testimony" not that it did so by discriminating based on the fact that he was hired pursuant to a settlement. GC 1(i), Complaint, at Paragraph 9. I need not resolve the question of whether the complaint allegation is broad enough to reach discrimination on the latter basis because, as discussed below, the evidence does not demonstrate that the Respondent bore animus against Moore because he was hired pursuant to the settlement agreement.

facility. Why would Grolec and Ahearn, or for that matter Bloom and McKamey, bear animosity towards Moore for alleging wrongdoing by an employer for whom they had never worked and by managers who were working for that other employer? Indeed, the record does not contain a shred of direct evidence that any of the supervisors and agents who participated in making the decisions challenged in this proceeding, bore such animosity. I also find that it was not shown that the Respondent bore animus towards Moore because it hired him pursuant to a settlement agreement concerning alleged wrongdoing at the Highlands. In fact, the Respondent did not avoid hiring persons who had worked for the Highlands, but rather used them as the primary source of employees. There is no record evidence indicating that, prior to the settlement, the Respondent made an effort to avoid employing Moore or any other former employee of the Highlands. Moreover, the Highlands, not the Respondent, was responsible for providing monetary relief under the settlement. I note, also, that the record does not show that between the time the Respondent began operating the facility and the time Moore was terminated, its employees had engaged in union activity or other activity protected by the Act. Indeed, the complaint does not allege that Moore engaged in any protected activity during his period of employment with the Respondent. On the face of it, this constellation of circumstances steers away from acceptance of the General Counsel's argument that the Respondent had animosity towards Moore because of his prior charge and testimony.

Against this background, the General Counsel struggles to conjure the appearance of animus out of a combination of what it characterizes as suspicious timing, disparate treatment, a failure to properly investigate the accusations against Moore, and shifting defenses. Examination of the evidence does not support finding that consideration of any of these indicia, either alone or in combination, favors finding animus. For example, the timing of the disciplinary actions[16] actually weighs against finding animus based on Moore's prior charge and testimony. Moore was not shown to have engaged in activity protected by Section 8(a)(4) and (1) at any time in proximity to the challenged discipline and discharge decisions. Indeed, the last time Moore had either filed a charge or given testimony was approximately 15 months prior to the challenged discipline. Moore did not file additional charges or give testimony or otherwise participate in Board processes during the 8 months after the Respondent hired him and before it terminated him. Prior to receiving resident #1's complaint about Moore, the Respondent had taken no disciplinary action at all against Moore – this despite the fact that Moore's habitual tardiness presented the Respondent with ample opportunity to do so. Given these circumstances, I find it wholly implausible that the Respondent's managers would suddenly decide in May 2016 that it was time to retaliate against Moore for his temporally distant charge and testimony alleging that a different employer had discriminated against him because of his union support. On the record here, the timing of the Respondent's discipline and termination of Moore weighs against a finding of animus.

The General Counsel's assertion that animus is indicated by the inadequacy of the Respondent's investigation of Moore's infractions is similarly unsupported on the record here. Regarding the Respondent's investigation of Moore's conduct when he left the facility during his shift, the investigatory efforts were clearly adequate given that Moore admitted to that conduct when asked about it by Golec. There was no contrary evidence and simply no reasonable need to further investigate what Moore did. There is also no dispute that Moore's conduct was

[16] The Board has put significant weight on the timing of discipline when assessing whether an inference of animus is appropriate. *Camaco,* 356 NLRB 1185; *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005), enfd. 232 Fed. Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enfd. sub nom. *Carolina Holdings, Inc. v. NLRB*, 5 Fed. Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994).

prohibited by the provisions of the Respondent's employee handbook. The record does not show that Golec, Ahearn or anyone else involved with the decision to terminate Moore had knowingly tolerated such misconduct by other employees. To the contrary, Golec credibly testified that she did not know of other employees who left the facility without clocking out to go to their cars or to jog around the facility's grounds. Moore himself told the Respondent that during his combined "5 years" working for the Highlands and the Respondent, he had never before left the facility without clocking out. This strongly suggests that Moore was aware that such conduct was neither common nor condoned.

The General Counsel's contention that the Respondent's investigation of Moore's refusal to assist a resident was suspiciously inadequate is also without merit. At the time of this incident the Respondent obtained multiple statements. Ahearn and Petteway (another CNA) each reported that resident #1 had complained that he asked Moore to transfer him to the bed for toileting, but that Moore had responded by saying he had paperwork to finish and refusing to provide the assistance. A third employee, a social worker, reported to Ahearn that resident #1 had made the same complaint. In addition, the Respondent obtained statements from witnesses Castanon (charge nurse) and Walker, both of whom stated that when Moore left resident #1 he resumed working on the computer. I note, moreover, that while, at trial, Moore claimed that after leaving resident #1 he proceeded directly to assisting another resident, not back to the computer, the statement he gave to the Respondent at the time does not support his trial testimony. If anything, Moore's written statement during the investigation corroborates the accounts of Castanon and Walker. In that written statement, Moore recounted that he had been doing "book work on the computer" when he went to resident #1, and had asked the resident if "he could wait until I finished." Given the consistency of the accounts of resident #1's complaint, the corroboration provided by both Castanon and Walker, and that Moore's own written contemporaneous account was not to the contrary, it was reasonable for the Respondent to proceed to discipline without further investigation. Moreover, the fact that the Connecticut Department of Public Health, after its own investigation, concurred with the conclusion of the Respondent's investigation regarding Moore's conduct, rebuts the General Counsel's suggestion that the Respondent's investigation only reached the conclusion it did because of animus.

The General Counsel contends that animus is shown in this case because the discipline imposed on Moore for his violations of the Respondent's policy was inconsistent with the discipline imposed on others. The Board has held that a showing of "blatant disparity is sufficient" to meet the General Counsel's burden of proving animus. *New Otani Hotel & Garden*, 325 NLRB 928, 928 fn.2 (1998). Where the General Counsel is attempting to use such disparity to satisfy its initial burden, as it is here, it is the General Counsel who bears the burden of proving the existence of such disparity. The record evidence regarding the cases that the General Counsel points to are not sufficiently developed to meet that burden. Even the skeletal evidence presented shows that most of those disciplinary decisions were made at a time before Grolec and Ahearn held the relevant decision making positions and involved misconduct that differed in significant respects from Moore's. As found above, many of the supposed comparator cases involved a failure to provide care through a lack of conscientious attention, not, as in Moore's case, the intentional and direct refusal of a resident's request for specific assistance. If one overlooks such meaningful distinctions, as the General Counsel does where convenient to its case, the evidence shows instances in which persons found guilty of violations comparable to Moore's received discipline comparable to what he received. For example, as noted in the statement of facts, in December 2016 another CNA who, like Moore, refused a resident's request for assistance with toileting, received a suspension and a written warning. Similarly, in January 2017 another employee who, like Moore, left the Respondent's facility during her shift without clocking out was, like Moore, terminated by the Respondent on that

basis. I find that the General Counsel had not come close to showing disparities in treatment sufficient to meet its initial *Wright Line* burden of proving that impermissible animus played a part in the Respondent's decisions to discipline and terminate Moore.

The General Counsel also argues that animus is shown because the Respondent offered contradictory and shifting defenses for its actions. This argument is meritless because the record does not show that the Respondent offered contrary and shifting defenses. A respondent's shifting defenses can be compelling evidence of pretext when it is shown that the respondent gave the employee or the Board nondiscriminatory explanations for its actions, but every time such an explanation was shown to be implausible, the employer pivoted to another, sometimes contradictory, nondiscriminatory explanation. See, e.g., *Bay State Ambulance Rental*, 280 NLRB 1079, 1087-1088 (1986). The record does not show that the Respondent did anything of the kind in this case. The General Counsel points to the Respondent's *internal* email discussions in which Ahearn stated to McKamey that she believed terminating Moore was justified both as a result of his "stealing" time by leaving the premises without clocking out and because he recorded a conversation with another employee.[17] However, those internal deliberations are not the same as defenses that that are raised to Moore or the Board. The only explanation for the termination decision that the Respondent ever gave to Moore or the Board, or set forth in the disciplinary paperwork, was Moore's conduct when he left the facility during his shift. The evidence does not show that the Respondent waivered or pivoted from that defense.

The General Counsel also asks me to find relevant animus based on Moore's testimony that Herpst asked him, "Why do you always have to give us trouble? Why can't you just do what we tell you to do?" To begin with, the record does not show that Herpst had any involvement with the disciplinary actions against Moore. To the contrary, Herpst was *not* the decisionmaker or even one of those who the record shows was consulted about those decisions. Moreover, while Moore had, in fact, been giving the Respondent "trouble" since coming to work at Cheshire – e.g., complaining about having to attend orientation, questioning the fingerprinting requirement, and demanding special prerogatives regarding assignments – the General Counsel has not established that any of that trouble was activity protected by Section 8(a)(4) and (1).

To summarize, the General Counsel would have me conclude that when the Respondent's managers disciplined Moore for neglecting a resident's request for help and shortly thereafter terminated him for leaving the facility during his shift without clocking out, it was discriminating because Moore had, in the somewhat distant past, filed a charge and given testimony that, while it named the Respondent as an additional employer, alleged unlawful conduct only by a different employer and different managers. Moreover, the General Counsel asks me to reach that conclusion despite the fact that the Connecticut State Department of Public Health independently concluded that Moore's neglect of the resident constituted a violation of state regulations. It may not be impossible to make such a case, but the General Counsel falls incalculably short of doing so in this case with its strained attempts to characterize the Respondent's reasonable actions as examples of suspicious timing, disparate treatment, and investigatory malfeasance.

For the reasons discussed above, I conclude that the complaint allegations regarding the discipline that Moore received in May 2016 and the termination of his employment in June 2016 should be dismissed.

[17] The General Counsel does contend either that Moore engaged in activity protected by the Act when she made this recording or that Moore was disciplined because she made the recording.

B. Allegation of More Onerous Working Conditions

The General Counsel has also failed to establish a prima facie case regarding its allegation that the Respondent discriminated on the basis of Moore's prior charges and testimony when it imposed more onerous working conditions on him by altering his work schedule. The General Counsel's effort to establish a prima facie case in this regard rests on the premise that the settlement agreement entitled Moore to enhanced consistency regarding floor/hallway assignments. As discussed above in the statement of facts, however, the settlement did not give Moore rights regarding his floor/hallway assignments.

In addition, I note that the evidence failed to show that Moore's relatively rare reassignments to different hallways constituted "more onerous working conditions." There was no meaningful evidence regarding differences between the work that CNAs on different hallways were called upon to perform. In particular, there was no evidence that the hall reassignments Moore received subjected him to more physically demanding duties, more difficult residents, inferior facilities or equipment, or different opportunities for overtime. Nor did the record demonstrate any way in which the simple fact of being reassigned on occasion to cover a different hallway on the same floor during a particular shift burdened Moore. Thus even if one believes, contrary to the evidence and my findings, that the Respondent assigned Moore in a manner that did not fully comply with the settlement agreement, a violation based on "more onerous working conditions" would not be shown here. See *Baddour, Inc.*, 281 NLRB 546, 548 (1986) (Change in assignment does not constitute more onerous working conditions where it is not demonstrated that the new duties are, in fact, more onerous.), enfd. 848 F.2d 193 (6th Cir. 1988), cert. denied 488 U.S. 944 (1988). A different analysis might be in order if the complaint allegation was that the Respondent had violated the Act by failing to comply with the settlement, but that is not alleged. Nor does the record show that the General Counsel ever pursued a compliance action to compel adherence to the view of the settlement that it forwards here.

The complaint allegation that the Respondent altered Moore's assignment, and thereby subjected him to more onerous working conditions, fails for yet another reason. The evidence shows that the alterations to Moore's assignment were de minimis. See *Scranton Lace Co.*, 294 NLRB 249, 252 (1989) (allegation of discriminatorily imposed "more onerous working conditions" fails where the conditions at-issue are "de minimis"). As noted in the statement of facts, during the period covered by the complaint allegation, the Respondent never altered Moore's floor assignment. There were four possible hallway assignments on that floor, and the Respondent was shown to have occasionally altered which hallway it assigned to Moore. However, in the vast majority of cases during the relevant time period the Respondent assigned Moore to the same floor *and* the same hallway. It was in just a handful of instances that Moore was assigned to other hallways on the floor. The evidence shows that there were other employees, for example Miron, who had their floor/hallway assignments altered more frequently than Moore. Only a single CNA on the floor – Walker – was shown both to have fewer "altered" assignments than Moore and to have less seniority. Thus even if one assumes, contrary to the record and my findings, that the settlement agreement language regarding seniority entitled Moore to preferred treatment with respect to floor/hallway assignments, the evidence here does not show that the Respondent meaningfully deviated from that requirement.

For the reasons discussed above, the complaint allegation that the Respondent violated Section 8(a)(4) and (1) since April 2016 by discriminatorily imposing more onerous working conditions on Moore should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent was not shown to have committed any of the violations of Section 8(a)(4) and (1) alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[18]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 9, 2018.

PAUL BOGAS
Administrative Law Judge

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.